April 25. 79 Reg. No. 4

9 Otto 645
Oct 9, 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 255.

THE CONGRESS AND EMPIRE SPRING COMPANY, PLAINTIFF IN ERROR,

vs.

ANN P. EDGAR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 16, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 255.

THE CONGRESS AND EMPIRE SPRING COMPANY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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1 *Summons for relief.—Com. ser.*

In the circuit court of the United States for the northern district of New York.

ANN P. EDGAR
vs.
THE CONGRESS AND EMPIRE SPRING COMPANY.

To the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in this action, which is herewith served upon you, and to serve a copy of your answer on me, at my office, No. 27 North Pearl street, Albany, N. Y., within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint, as hereby required, the plaintiff will apply to the court for the relief demanded in the complaint.

Dated February 14th, 1873.

CHARLES W. REYNOLDS,
Plaintiff's Att'y, Albany, N. Y.

2

3 In the circuit court of the United States for the northern district of New York, February, 1878.

ANN P. EDGAR
vs.
THE CONGRESS AND EMPIRE SPRING COMPANY.

The complaint of the above-named plaintiff respectfully shows to this court:

That the plaintiff is a citizen of the State of New Jersey, and a resident of Rahway, in the said State, and the defendant is a corporation created by and existing under the laws of the State of New York, and a citizen and resident of said State, and thereupon the said plaintiff complains:

That heretofore, to wit, and on and for a long time prior to the 20th day of October, 1870, the said defendant had been and was the owner and proprietor of several mineral springs, in the village of Saratoga Springs, in the county of Saratoga and State of New York, one of them known as "Congress Spring," and extensively patronized by pleasure-seekers, people of fashion, and invalids, of various degrees and conditions, and by reason thereof the said Congress Spring had become

4 and is now very celebrated for its medicinal and other qualities, and by reason thereof the said defendant has realized, and does realize, great gains and profits.

And the plaintiff further shows that the said Congress Spring has for a long time been kept open and accessible to the public generally, and all people have been invited to patronize its waters, in various forms, by the said defendant; that, to make it more inviting and attractive, the said defendant has opened, in connection therewith, an extensive park, ornamented with fountains, trees, sh'ubbery, and flowers, through which extensive gravelled walks are made for the use and comfort of

those who indulge in the use of the mineral waters aforesaid, and enjoy the delights of the landscape. And the said park, the further to enhance its attractions, the said defendant has obtained and in some degree domesticated several wild deer, and among them a large and powerful buck, with large and dangerous horns, and of vicious character and habits, and well known to the defendant, its officers and agents, and to the residents of the village of Saratoga Springs, as the "Ugly Buck."

5 And the plaintiff further avers that the said defendant, its officers and agents, well knowing that the said buck was vicious, and dangerous to be permitted to run at large in the park aforesaid, did, on the day and at the place aforesaid, permit the said buck to run at large in the said park, and while the said plaintiff on the day aforesaid had visited the said Congress Springs to partake of its waters, and was in the day-time peaceably proceeding along one of the walks in the said park, constructed by the defendant for the comfort of visitors, the said vicious buck did fiercely attack the said plaintiff with his horns, head, and feet, and did bite, bruise, and greatly lacerate the said plaintiff in various parts of her person, and by reason thereof the said plaintiff became sick, sore, lame, and disordered, and has so ever since continued, and during all which time the said plaintiff has suffered great pain and anguish and prevented from attending to her ordinary avocations, or to enjoy any of the comforts of life, and also, by means of the premises, the said plaintiff has been put to large costs and charges for medical attendance and otherwise, amounting to over one thousand dollars, in endeavoring to be cured of the aforesaid injuries, and hath been and is by means of the premises otherwise greatly injured and damnified, to wit, to the amount of twenty thousand dollars, and for

6 that sum the plaintiff demands judgment with costs of this suit.

CHARLES W. REYNOLDS,
Plaintiff's Att'y.

(Indorsed:) In the circuit court of the United States for the northern district of New York. Ann P. Edgar vs. The Congress and Empire Spring Company. Complaint. Charles W. Reynolds, att'y for plff, Albany, N. Y. Filed Feb'y 15, 1873.

7 United States circuit court, northern district of New York, February 15, 1873.

ANN P. EDGAR
vs.
THE CONGRESS AND EMPIRE SPRING COMPANY.

On filing complaint or narr in this case, and on motion of Charles W. Reynolds, plaintiff's attorney, ordered, that the defendant herein appear and plead thereto within twenty days after service of a copy thereof, and notice of the entry of this rule or judgment.

8, 9 In the circuit court of the United States, northern district of New York.

ANN P. EDGAR
agt.
THE CONGRESS & EMPIRE SPRING COMPANY.

The above-named defendant in answer to the complaint in this action denies the same and each and every allegation therein contained.

Second. And for a further and separate defence and answer to said complaint, defendant states that the damage and injury complained of by the plaintiff was occasioned by the fault and negligence of the plaintiff, and by her neglect and refusal to obey the reasonable rules and regulations of the defendant, and by her voluntary disregard of the express notice given her by said defendant to keep off the grass in the grounds of said defendant, and not to interfere with or molest the buck mentioned in the complaint; wherefore defendant demands that *that* said complaint be dismissed with costs.

CHARLES S. LESTER,
Def'ts Att'y, Saratoga Springs.

10 (Indorsed:) In the circuit court of the United States for the northern district of New York. Ann P. Edgar vs. The Congress and Empire Spring Co. Answer. Charles S. Lester, def'ts att'y, Saratoga Springs, N. Y. Mailed Feb'y 27, 1873. Filed April 13, 1876.

11 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Albany on Wednesday the 13th day of October, in the year of our Lord one thousand eight hundred and seventy five, 2½ o'clock p. m.:

Present: The honorable William J. Wallace, judge; G. W. Miller for plaintiff; Charles S. Lester & Henry Smith for defendant.

ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY.

On motion of George W. Miller, plaintiff's attorney, ordered, that a jury be empannelled, and that the trial of this cause do now proceed.

Whereupon the following-named jurors were called:

David Toohey, challenged peremptorily by defendant.
Patrick McGrath, " " " plaintiff.
Paul Schummaker, excused by the court.

Jurors sworn: Thomas Cheever, John Wager, Philip O'Bryne,
12 Patrick Welch, Edward B. Mitchell, Francis Martin, Thomas Cook, j'r, Christopher M. Bender, William H. Girgune, S. V. L. Fonda, John Barton, George Stewart.

M'r Miller opens case for plaintiff.

Court adjourned until 10 o'clock a. m. to-morrow.

ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY.

THURSDAY, *Oct.* 14, 1875—10 *o'clock a. m.*

Court met. Present: Hon. William J. Wallace, judge,

Jury called: 12 answer.

Trial continued.

Plaintiff's witnesses sworn: Ann P. Edgar, Edward R. Hun, Jesse A. Perkins, Sylvester E. Strong, Hiram H. James, Herbert N. Hurst.

Court takes a recess until 3 o'clock p. m.

13 ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY.

3 O'CLOCK P. M.

Court met.
Present: Hon. William J. Wallace, judge.
Jury called: 12 answer.
Trial continued.
Plaintiff's witnesses sworn: Herbert N. Hurst, recalled; Walker R. Johnson, M'r's Powers, James G. Baem.
Plaintiff rests.
No evidence offered by defendant.
M'r Smith moves for non-suit.
Motion denied.
M'r Smith sums up case for defendant.
M'r Miller sums up case for plaintiff.
Court charges jury.
The jury retire in charge of a sworn bailiff to consider their verdict.
Court adjourned to 10 o'clock a. m. to-morrow.

14 ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY.

FRIDAY, *October* 15, 1875—10 *o'clock a. m.*

Court met. Present: Hon. William J. Wallace, judge.
The jury here came into court and, being called, answer and say that they have agreed upon their verdict.
Verdict presented to the court.
Court directs the jury that if they find a verdict for the plaintiff it must be for a specific amount.
Jury retire to further consider their verdict.
The jury here again come into court and being called answer and say they find a verdict for the plaintiff.
Verdict presented to the court.
Court directs the jury to again retire and bring in a verdict for a specific amount.
Jury again retire.
The jury again come into court and, being called, answer and
15 say they find a verdict for the plaintiff, and assess the damages at $6,500.00.
Jury discharged.
Motion by defendant to set aside verdict.
Ordered, stay of proceedings for thirty days for defendant to prepare case, with leave to turn the same into a bill of exceptions.

16

17 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Utica on Wednesday, the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-six—
Present, the honorable William J. Wallace, judge.

ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY.

A motion for a new trial herein having been heretofore argued by

counsel for the respective parties, and the court having duly considered the same, ordered that said motion be, and the same is hereby, denied.

18 *Judgment.*

United States circuit court, northern district of New York.

ANN P. EDGAR
vs.
THE CONGRESS & EMPIRE SPRING COMPANY. } April 13, 1876.

This case having been tried at a stated term of said circuit court, held at Albany on the 13th, 14th, & 15th days of October, 1875, before the Hon. William J. Wallace, judge, and a jury, and the jury having rendered a verdict in favor of the plaintiff, and assessed the damages at six thousand five hundred dollars, and an order staying proceedings for thirty days, for defendants to prepare case, with leave to turn the same into a bill of exceptions, having been entered, and a motion for a new trial having been duly argued by counsel for the respective parties, and an order denying said motion for a new trial having been entered: Now, on motion of George W. Miller, plaintiff's attorney, it is ordered that the said plaintiff, Ann P. Edgar, do recover of the said defendant, The
19 Congress & Empire Spring Company, the sum of six thousand five hundred dollars, and interest thereon from the 15th day of October, 1875, amounting to two hundred and twenty-four dollars and ninety-six cents, amounting in the whole to the sum of six thousand seven hundred and twenty-four dollars and ninety-six cents damages; and also the further sum of two hundred and twenty dollars and seventy-four cents, costs and disbursements of this action as taxed, amounting in the aggregate to the sum of six thousand nine hundred and forty-five dollars and seventy cents, and that execution issue therefor, &c.

Judgment signed this 13th day of April, 1876.

CHARLES MASON, *Clerk.*

20 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Ann P. Edgar vs. The Congress & Empire Spring Company. Judgment record. George W. Miller, plaintiff's attorney. Damages, $6,724.96; costs, 220.64—$6,945.70. Filed April 13, 1876, 4 p. m.

21 *Bill of exceptions.*

In the circuit court of the United States for the northern district of New York.

ANN P. EDGAR
vs.
THE CONGRESS AND EMPIRE SPRING COMPANY. }

The pleadings herein are made a part hereof.

Afterwards, to wit, at a term of said court held at the United States court-rooms in the city of Albany, in and for said district, on the 13th day of October, 1875, before the Hon. W'm J. Wallace, judge of said court, and a jury, the aforesaid issues so joined between the said parties as aforesaid came on to be tried, at which day came as well the

said plantiff as the said defendant, by their attorneys aforesaid, and the jurors of the jury aforesaid empannelled to try the said issues being called, also came, and were then and there in due manner chosen and sworn to try the said issues.

The plaintiff, in order to maintain the issues upon her part, was offered and sworn as a witness, and testified in substance: That she resided in Rahway, New Jersey; that she visited Saratoga Springs in 1869, and when there stopped at the Remedial Medical Institute
22 of D'r Strong; that she was there treated for some disease peculiar to females, and returned there for further treatment in September, 1870; that on the morning of the 18th of October, 1870, she entered the Congress Spring Park, belonging to the defendant, in which was situated the Congress and Columbian Springs; that the park was laid out with graveled walks, and ornamented with statuary, and generally left open to the public; that after drinking at the spring she walked through the grounds and met a deer, which attacked her, goring and striking her upon the shins with his head and horns, and throwing her down and striking her upon the end of her spine; that by the assistance of a gentleman she walked to the bottling-house of defendants, and was taken from thence to D'r Strong's in a carriage; that she was confined for about two weeks to her room, and it was six weeks before she went downstairs; she was attended for several months by D'r Strong for those injuries, remaining on their account until May, 1871, at D'r Strong's; that she returned home in May, 1871, and that in consequence of these injuries she was for some time, and evidence was given tending to show she had ever since been, unable to perform the operations of nature without mechanical assistance;
23 that she suffered considerable pain, and was unable to sleep throughout the night. Evidence was given tending to show that at the time of the injury she had substantially recovered from her originalill health; that she had paid D'r Strong and D'r James for medical attendance $1,650.

On being cross-examined, she testified in substance that before this occurrence she had frequently been in the habit of going to Congress Spring Park to enjoy the water, and the pleasure of a walk; that she noticed the deer in the park as early as 1869, and had often seen them running about on the lawn; that she had seen persons fondling the deer and playing with them on different occasions; that she had noticed signboards through the park containing the notice "Beware of the buck"; that she was 51 years of age, and she was sick as early as 16 with dyspepsia and constipation of the bowels, and was under medical treatment for these difficulties for 14 years; that in 1866 her nervous system was weakened by overexertion, which continued until the fall of 1870, during which time she was under medical treatment; that the bills of D'r Strong included board and everything else, and only contained the sum of $12 for extra medical attendance. The charge of $15 or $17
24 per week for board included ordinary medical treatment.

D'r SYLVESTER E. STRONG was sworn as a witness for plaintiff, and testified in regard to the condition of plaintiff during her stay at his medical institute, and the character of the injuries, particularly as to an injury at the base of spine, or on the coccyx.

On cross-examination he testified that when plaintiff came to his institution her nervous system was very much broken down, and she was suffering from dyspepsia, and evidence was given tending to show that

at the time of the injury by the deer she had acquired very fair general health.

JESSE A. PERKINS was sworn as a witness for the plaintiff, and testified in substance that he was a dentist, and resided in Albany, and was to some extent acquainted with the habits and nature of the deer, and had hunted them sometimes.

Question. Can you tell the general nature of the buck-deer of this region of the country, in regard to their being mischievous or dangerous or otherwise, particularly in the fall season of the year?

(This question was objected to by defendant's counsel on the
25 grounds:

First. The witness is not shown competent to answer.

Second. As improper, immaterial, and incompetent.

Which objections were overruled; and the defendant's counsel duly excepted.)

The witness then answered as follows: They are not considered generally as dangerous, but in the fall they are more dangerous than at other times. I believe they are considered dangerous in the rutting season, more so than at other times.

Question. Do you understand whether they are liable to be aggressive and attack people in the fall of the year?

A. So far as domestic deer are concerned, I have no experience in the matter except in one case.

Q. Do you consider a buck old enough to have large horns, say 3 or 4 or 5 years old, in the middle of the month of October, a safe or dangerous animal?

(Objected to by defendant's counsel, on the following grounds:

First. The witness is not competent to give an opinion upon the subject.

Second. The opinion of the witness is not competent evidence.

Third. It is inadmissible, immaterial, and improper.

26 Which objections were overruled; and the defendant's counsel duly excepted.)

The witness thereupon answered: I have the authority of a hunter and trapper of 25 years' experience to the facts I have stated. I consider him a dangerous animal.

On cross-examination the witness testified in substance that in his experience as a hunter the principal difficulty was to get near the deer; that as a general thing a deer would run away at the sight of a child; that he had never been injured by a buck in his wild state; that he had never heard of anybody being attacked by a buck in the wild state, while in the rutting season, and that he could not say he had ever read any account anywhere of a buck in the wild state in the rutting season attacking anybody, and he had never heard anybody say that he was attacked by a buck in the natural state, in the rutting season, but had heard many hunters say they were dangerous when wounded; had talked with a great many upon the subject, and that a buck in the rutting season witness thought was dangerous.

(Defendant's counsel here moved to strike out the testimony
27 given by the last witness that the deer in the natural state are dangerous in the rutting season, on the grounds heretofore stated.

Which motion was denied; and the defendant's counsel duly excepted.)

H. N. HURST was then sworn and examined as a witness on behalf of the plaintiff, and testified that he resided in Albany, and was a taxidermist; that he had made some study of natural history, and had

read somewhat the standard authors in regard to the general characteristics of deer.

Question by plaintiff's counsel. From your knowledge upon that subject, are the male deer, after they have obtained their growth and become matured, in the fall of the year, dangerous or otherwise?

(To this question defendant's counsel objected:

First. The witness is not shown competent to give an opinion.

Second. The opinion of the witness is not competent evidence.

Third. The question dangerous or otherwise is too general.

Fourth. The evidence is immaterial and inadmissible.

28 Which objections were overruled; and the defendant's counsel duly excepted.)

And the witness answered as follows: I would consider them dangerous.

Q. Now, you may state further, in a general way, what you understand to be, from the standard authors which you have read on this subject, the peculiar characteristics of the buck-deer in the fall of the year.

(Defendant's counsel objected on the grounds above stated, which objections were overruled, and defendants' counsel duly excepted.)

The witness then answered in substance: That from the 15th of September to the 13th of December was called the rutting season; and during that time buck-deer are generally vicious; that if you get in their way you are liable to get the worst of it.

On cross-examination witness testified that he had never seen, read, or heard of a case of anybody that had got injured by a wild deer while he was in that state.

WALKER R. JOHNSON, being sworn as a witness for the plaintiff, testified in substance: That he resided in Saratoga Springs, and was secretary of the defendant; that the business of the defendant is putting up and selling mineral-waters; that the park in which the springs

29 are situated contains about eleven acres; that in 1870 there were 9 deer in the park, among which were 3 bucks, the oldest of which was 4 years old; that he first learned that this buck was ugly when the plaintiff was knocked down; that in 1868 notices were put up in the park cautioning visitors not to tease or worry the deer; that such notices were posted at different places in the park; that this park was frequented by a great number of people with the consent of the defendant all through the season; that the object of keeping deer in their park was their beauty; that up to the time of this accident he had no knowledge, information, or belief that a deer or buck, or this buck in the rutting season, or any other, ever attacked a person that was not disturbing or interfering with him.

The testimony having closed, the defendant's counsel moved that the complaint in this action be dismissed and the plaintiff be nonsuited, and that a verdict be directed in favor of the defendant on the following grounds:

1. The evidence does not establish a cause of action.

2. It appears that the place where the accident happened was the private grounds of the defendant; that the plaintiff knew that

30 the defendant kept in those grounds this buck and other deer, and went there with full knowledge of all the circumstances.

3. That the plaintiff is chargeable with the same knowledge of the character of the buck as the defendant.

4. That no knowledge by the defendants of the vicious character of the buck has been shown.

5. That if any negligence existed the plaintiff was guilty of negligence equally with the defendant.

The court denied the motion, and thereupon the defendant's counsel duly excepted.

The court thereupon charged the jury, and among other things stated to the jury as follows: "Some testimony has been produced here by witnesses who have stated to you the result of their reading in natural history, and the result of the opinion expressed by hunters and sportsmen as to the general characteristics of the deer; and it is for you to say, gentlemen, how much is proved by that evidence. The plaintiff claims to show by that evidence that the deer at a certain season of the year is a dangerous animal. It is for you to say whether, after the cross-examination of the witnesses, you can arrive at that conclusion."

31 Upon the question of damages, the court, among other things, charged the jury as follows:

"In these cases, while, upon the one hand, a jury should guard themselves against the exaggeration which so frequently, and I may say, generally, characterize the statements of the parties in regard to their injuries, and in regard to the damages they have sustained, upon the other hand, when you make up your mind as to the amount really sustained, you are not to be nice in the award of compensation. It should be liberal." To which portion of the charge, commencing with the words, "when you make up your mind," the defendant's counsel duly excepted.

The jury rendered a verdict for the plaintiff for sixty-five hundred dollars.

Upon a case and exceptions, and upon the ground that the damages were excessive, defendant made a motion before the judge before whom the cause was tried for new trial, which was denied.

And inasmuch as the said several matters so produced and given in evidence, and the objections so made and taken, and the proceedings thus had upon the trial, do not appear by the record of said trial,

32 and of the verdict aforesaid, the counsel for the defendant did then and there propose these aforesaid exceptions to the opinions and rulings of the said court, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence, and objections and exceptions thus made and taken according to the law and practice of the court; and thereupon the said district judge, at the request of the said counsel for the defendant, has hereunto affixed his name and put his seal to this bill of exceptions.

W'M J. WALLACE,
Judge U. S. Dist. Court.

33

34 (Indorsed:) In the circuit court of the U. S. for the N. dist. of N. Y. Ann P. Edgar vs. The Congress & Empire Spring Company. Bill of exceptions. C. L. Lester, def't's att'y, Saratoga Springs, N. Y. Filed June 9, 1876.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the

circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Ann P. Edgar, plaintiff, & the Congress & Empire Spring Company, defendant, a manifest error hath happened, to the great damage of the said The Congress & Empire Spring Company, as by
36, 37 their complaint appears, we being willing that error, if an hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Sureme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 13th of April, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

CHARLES MASON,
Clerk of the Circuit Court of the United States, Northern District of New York.

Allowed by—
WM J. WALLACE,
U. S. Dist. Judge.

38 (Indorsed:) In the circuit court of the United States for the northern district of New York. Ann P. Edgar, def't in error, vs. The Congress & Empire Spring Company, pl'ff in error. Writ of error. Charles S. Lester, Saratoga Springs, att'y for pl'ff in error. Filed April 25, 1876.

39 Supreme Court of the United States.

ANN P. EDGAR
against
THE CONGRESS AND EMPIRE SPRING COMPANY.

Know all men by these presents that we, The Congress and Empire Spring Company, Cornelius Sheehan, and John L. Leake, all of the village of Saratoga Springs, Saratoga County, N. Y., are held and firmly bound unto Ann P. Edgar, of Rahway, N. J., in the sum of fourteen thousand dollars, to be paid to the said Ann P. Edgar, her executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents; sealed with our seals, dated this thirteenth day of April, one thousand eight hundred and seventy-six.

Whereas the above named Congress and Empire Spring Company hath prosecuted a writ of error to the Supreme Court of the
40 United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named Congress and Empire Spring Company shall prosecute its said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CONGRESS & EMPIRE SPRING CO.,
[L. S.] P. W. R. JOHNSON, *Sec'y.*
C. SHEEHAN.
JNO. L. LEAKE.

Sealed and delivered in the presence of—
CHARLES C. LESTER.

STATE OF NEW YORK,
Saratoga County, ss:

Cornelius Sheehan, one of the subscribers to the foregoing undertaking, being sworn, says that he is a resident and property holder within this State, and is worth the sum of fourteen thousand dollars over and above all his debts and liabilities, and besides his property by law exempt from execution.

C. SHEEHAN.

Sworn before me this 13th day of April, 1876.
CHARLES C. LESTER,
Notary Public.

41 STATE OF NEW YORK.
Saratoga County, ss:

John S. Leake, one of the subscribers to the foregoing undertaking, being sworn, says that he is a resident and free-holder within this State, and is worth the sum of fourteen thousand dollars over and above all his debts and liabilities, and besides his property by law exempt from execution.

JOHN S. LEAKE.

Sworn before me this 13th day of April, 1876.
CHARLES C. LESTER,
Notary Public.

STATE OF NEW YORK,
County of Saratoga, ss:

On this 13th day of April, 1876, personally appeared before me Walker R. Johnson, secretary of the Congress and Empire Spring Company, Cornelius Sheehan, and John S. Leake, to me known to be the same persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

CHARLES C. LESTER.
Notary Public.

42 (Indorsed:) Supreme Court of the United States. The Congress & Empire Spring Company, pl'ffs in error, ads. Ann P. Edgar, de'ft in error. Copy. Bond on appeal. Charles S. Lester, Saratoga Springs, att'y for pl'ff in error. Approved April 17, 1876. W'm J. Wallace. Filed April 25, 1876.

43 UNITED STATES OF AMERICA, *ss:*

To Ann P. Edgar, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein the Congress & Empire Spring Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States this 17th day of April, in the year of our Lord one thousand eight hundred and seventy-six.

W'M J. WALLACE,
U. S. Dist. Judge.

44 (Indorsed:) U. S. Supreme Court. The Congress & Empire Spring Company, plaintiff in error, against Ann P. Edgar, defendant in error. Citation. Charles S. Lester, att'y for pl'ff in error. Allowed.

I admit service of a copy of the within citation this 10th day of June, 1876.

GEO. W. MILLER,
Pl'ff's Att'y.

Filed June 28, 1876.

45 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Ann P. Edgar vs. The Congress and Empire Spring Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica in said district, this 8th day of September, A. D. 1876.

[SEAL.] CHARLES MASON, *Clerk.*

46 Supreme Court of the United States. Of the term of October, in the year of our Lord one thousand eight hundred and seventy-six.

THE CONGRESS & EMPIRE SPRING COMPANY, pl'ff in error,
ag't
ANN P. EDGAR, DEF'T IN ERROR.

Afterwards, to wit, on the day of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Congress & Empire Spring Company, by Charles S. Lester, of Saratoga Springs, its attorney, and says in the records & proceedings aforesaid, & also in giving the judgment aforesaid, there is manifest error, in this, that the judge who tried the cause erred in excluding the evidence offered by the plaintiff in error, & also erred in admitting the testimony objected to by

the plaintiff in error, & also erred in charging the jury as stated in the bill of exceptions.

And also there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Ann P. Edgar against the said Congress & Empire Spring Company, whereas, by the law of the land, the said judgment ought to have been given for the said The Congress & Empire Spring Company against the said Ann P. Edgar. And the said The Congress & Empire Spring Company prays that the judgment aforesaid for the errors aforesaid, & for other errors in the said record and proceedings being, may be reversed, annulled, & altogether holden for nought, & that said company may be restored to all things which it hath lost by occasion of the said judgment, &c.

CHARLES S. LESTER,
Att'y for Pl'ff in Error.

(Indorsed:) No. 850. Supreme Court of the United States. The Congress & Empire Spring Company, pl'ff in error, ag't Ann P. Edgar, def't in error. Copy. Assignment of errors. Charles S. Lester, att'y for pl'ff in error.

(Indorsed:) Supreme Court of the United States. The Congress & Empire Spring Company, pl'ff in error, vs. Ann P. Edgar, def't in error. Writ of error & return.

(Indorsement on cover:) No. 255. The Congress & Empire Spring Company, plaintiffs in error, vs. Ann P. Edgar. N. New York. C. C. U. S. Filed 16th October, 1876.

SUPREME COURT of the UNITED STATES.

THE CONGRESS & EMPIRE SPRING COMPANY, Plaintiff in Error,

ag'st

ANN P. EDGAR, Defendant in Error.

Brief by C. S. Lester, Counsel for the Plaintiff in Error.

STATEMENT OF CASE.

The plaintiff in error is a corporation created under the laws of the State of New York, and the owner of the Congress Spring and the pleasure grounds and park connected therewith. These grounds are laid out with gravelled walks and ornamented with fountains, trees, shrubbery and flowers. To make them still more attractive to visitors a few domesticated deer were kept in the park during and for several years prior to the year 1870. The grounds were open to the public and visited by thousands of people during the season. The defendant in error was an invalid stopping at a remedial institute at Saratoga Springs, and during the years 1869 and 1870, a frequent visitor to the park. She had seen people on different occasions playing with the deer, and knew that they were kept in the park.

On the 18th of October, 1870, the defendant in error while walking in the park met and was attacked

by one of the deer, which threw her down and inflicted some injuries. For the injuries thus sustained an action was brought. No evidence was given to show that this particular deer had ever before attacked any of the numerous visitors to the park, nor that any of the owners knew he was vicious or dangerous.

The cause was tried before Hon. William J. Wallace and a jury in October, 1875, and a verdict rendered for the defendant in error for $6,500.

The questions raised by the plaintiff in error are the failure of the defendant in error to make out a cause of action—the improper character of the evidence admitted to show that the American deer is a fierce and dangerous animal,—and the charge of the judge that the plaintiff in error was liable to primitive damages for an accident happening while the plaintiff in error was endeavoring to render a gratuitous favor to the defendant in error.

ASSIGNMENT OF ERRORS.

1. The defendant in error failed to show that the plaintiff in error was guilty of any negligence in keeping deer in its park, or any knowledge that this particular deer had ever before attacked any person, or if the dangerous character of a deer is so notorious that every person is deemed to have knowledge of it, then the defendant in error was guilty of contributory negligence in visiting the park, well knowing that the deer were there, and the court should have directed a verdict for plaintiff in error.

2. The court erred in admitting the following questions put to the witness PERKINS at fol. 25, page 7 of the record and his answer thereto:

Q. Can you tell the general nature of the buck deer of this region of the country, in regard to their

being mischievous or dangerous or otherwise, particularly in the fall season of the year?

A. They are not considered generally as dangerous, but in the fall they are more dangerous than at other times. I believe they are considered dangerous in the rutting season more so than at other times.

Q. Do you consider a buck old enough to have large horns, say three or four or five years old, in the middle of the month of October, a safe or dangerous animal?

A. I consider him a dangerous animal.

3. The Court erred in refusing to strike out the testimony of the witness Perkins as requested at fol. 27, page 7, of the record.

4. The Court erred in allowing the following questions put to witness HURST and his answers thereto, (fols. 27 and 28, pages 7 and 8 of the record), it appearing that his only knowledge of the habits of deer was derived from reading some authors on the subject of natural history.

Q. From your knowledge upon that subject are the male deer, after they have obtained their growth and become matured, in the fall of the year dangerous, or otherwise?

A. I would consider them dangerous.

Q. Now you may state further, in a general way, what you understand to be from the standard authors which you have read on this subject, the peculiar characteristics of the buck deer in the fall of the year?

A. From the 15th of September to the 13th of December is called the rutting season, and during that time buck deer are generally vicious; if you get in their way you are liable to get the worst of it.

5. The court erred in charging the jury upon the question of damages as follows: (fol. 31, page 9 of the record.)

"When you make up your mind as to the amount really sustained, you are not to be nice in the award of compensation. It should be liberal."

ARGUMENT AND AUTHORITIES.

The liability of an owner of an animal of any description for an injury committed by such animal is founded upon negligence, actual or presumed.

Earl v. Van Alstyne, 8 Barb. Rep. 630.
Wharton on Negligence. §§ 918-926.
Earhart v. Youngblood, 27 Penn. St. 327.
Shearman & Redfield on Negligence, § 185.
Munn v. Reed, 4 Allen, 431.
Ilott v. Wilkes, 3 Barn. and Ald. 304.

It is well settled that the owner of a domestic animal like a dog, horse or cow, is not liable for injuries committed by it unless he had notice that it w accustomed to do mischief.

Buller's Nisi. Prius. 77.
3 Blackstone's Com. 153.
Vrooman v. Sawyer, 13 John. 339.
Van Leuven v. Lyke, 1 Comst. 515.

The reason of the rule is that domestic animals are not naturally and usually aggressive or mischievous and until notice that they are inclined to bite, gore or injure mankind, is brought home to the owner, he is not liable for negligence in not confining them to prevent mischief, but it is otherwise with reference to animals fierce, dangerous and irreclaimable whose propensity to do mischief is inherent. In the latter case the owner must confine them at his peril.

This distinction in the liability of the owner of different classes of animals does not depend upon their being *ferœ naturæ* or *mansuetæ naturæ* be-

cause rabbits and doves are *feræ naturæ* as well as bears and lions, but the classification of animals into wild and domesticated is made with reference to rights of property in such animals and not to the liability of their owners for injuries. Deer, although *feræ naturæ* may be reclaimed and domesticated when they cease to be *feræ naturæ*. 2 Kent's Com. 348. The common law refers the question whether an animal is wild or tame to our knowledge of his habits derived from fact and experience. *Idem* 349.

It follows, therefore, that if the deer was a domesticated animal there was no cause of action made out because there was no evidence that it had ever before committed any injury, or exhibited any disposition to commit an injury, nor that the defendant had any knowledge that it possessed a dangerous disposition, and the court should have directed a verdict for defendant.

But if it is claimed that a deer belongs to the same class of animals as lions, bears and tigers, then the plaintiff is chargeable with the same knowledge of its dangerous character as the defendant and her negligence in going into the enclosure where she knew this deer was confined, was such contributory negligence as barred her from recovering.

Wharton on Negligence, § 926,
Earhart v. Youngblood, 27 Penn. St., 327.
Brock v. Copeland, 1 Espinasse, 203.
Blott v. Wilkes, 3 Barn. and Ald, 304.

Our law is the same as the Roman law, which assumed that when mischievous tendencies are natural to animals they are to be regarded as general laws, knowledge of which is supposed to belong to all men. (Wharton on Negligence, § 907.)

Experts
Bonnier
Bristow v Sequeville
5 Exch 275
Nelson v Sun. Mt. Insc Co
71 N.Y. 453

II.

The evidence admitted to prove the general ch
acter of the American deer was either inadmissa
because the plaintiff was presumed to have kno
edge of its character or it was incompetent.

The witness HURST, at folio 27, who had ne
seen this deer or any deer was permitted to give
opinion as to the character and disposition of a de

This was manifest error.

1. The character and disposition of a wild or
mestic animal is a fact to be ascertained by expe
ence and not a question of science, skill or trade
which the opinion of an expert is admissable.

It is only upon questions of science, skill or tra
that opinions of experts are admissable.

1 Greenleaf's Evidence, § 440.
DeWitt v. Bailey, 5 Selden, 375.
Hewlet v. Wood, 55 New York, 634.

2. The books of natural history which the witn
said he had read would not of themselves have be
competent evidence.

Commonwealth v. Wilson, 1 Gray 337.
Morris v. Lessee of Harmer's heirs, 7 Peters, 554.
McKinnon v. Bliss, 21 New York, 206.
Collier v Simpson 5 L O B. 73

The statements of the witness therefore as to wh
he had read in relation to living animals well kno
to many people was the merest hearsay and its a
mission was error.

III.

The Judge erred in charging the jury, (fol. 31, pa
9). "When you make up your mind as to t
amount (if damages) really sustained, you are not

be nice in the award of compensation. *It should be liberal.*"

This was, in effect, instructing the jury that the plaintiff was entitled to something more than actual compensation—that she was, in fact, entitled to exemplary, or punitive, damages. The word "liberal" means profuse, generous, ample, something more than strict and just compensation, and it was so understood by the jury. This word is frequently used by Judges, and in text books as synonymous with exemplary.

In *Tullidge* v. *Wade*, (3 Wilson, 18), which was an action of trespass for debauching plaintiff's daughter, Lord Wilmot said: "Actions of this sort are brought for example's sake, and though the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving *liberal damages.*"

In *Whipple* v. *Walpole*, (10 New Hampshire, 130), Wilcox, J., says: "In actions for torts to the person, and to personal property, the jury may give *liberal or exemplary damages* in their discretion."

In *Tillotson* v. *Cheetham*, (3 John Rep., 64), the same language is used by Chancellor, then Chief Justice Kent. And in *Taylor* v. *Church*, (4 Selden Rep., 463), the same expression is used by Judge Jewett.

See, also, Sedgwick on Damages, p. 40. "Liberal damages" being thus understood by Judges and legal writers as meaning the same as "exemplary damages," the question arises was this a case for exemplary damages.

The defendant is a corporation. There was no malice or intention to injure, but if any intention can be inferred, it was an intention to please.

It is well settled that exemplary damages are only

recoverable where there has been wilful misconduct, or a positive intention to injure.

Milwaukie & St. Paul Railway Co. v. Ames, 1 Otto, 489.
Cleghorn v. N. Y. Central and H. R. R. R., 56 N. Y., 44.
Hamilton v. Third Av. R. R. Co., 53 N. Y., 25.
Wallace v. Mayor of New York, 18 How. Pr. Rep., 169.

Exemplary damages are never recoverable against the owner of an animal for injuries.

Keightlinger v. Egan, 65 Ill., 235.

The judgment should therefore be reversed and a new trial ordered.

CHARLES S. LESTER,
Att'y for Pl'ff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CONGRESS AND EMPIRE SPRING CO., PLAINTIFF IN ERROR,
against
ANN P. EDGAR, DEFENDANT IN ERROR.

Brief for defendant in error.

Error to the Circuit Court of the United States for the Northern District of New York.

The action was brought by defendant in error, a resident of New Jersey, to recover for personal injuries inflicted by a buck deer, the property of plaintiff in error, in the Congress Spring park at Saratoga Springs.

The action was commenced in February, 1873.

The injuries were received in October, 1870.

The action was last tried in October, 1875.

A motion for a new trial upon a case and exceptions, was made, argued and denied in March, 1876.

The case is here upon a writ of error and a bill of exceptions.

The facts as shown by the evidence were, that defendant in error, a maiden lady, in October, 1870, being a sojourner at Saratoga, in common with the general public, visited the Congress Spring park, being ornamental grounds of several acres thrown open to the public and the property of plain-

tiff in error; that there she was suddenly and unexpectedly attacked by a large buck deer four or five years old and having large horns. That she was thrown down and rolled down a small embankment and was trodden upon and gored by the animal and that she was struck a severe blow by the horn upon the end of the spine producing permanent injuries from which she had not recovered; and as the evidence of surgeons showed, she would probably never recover. That as a result of this injury upon the coccyx, she had been, and probably always would be, unable to perform the operations of nature without mechanical assistance.

The errors assigned (fol. 40) are:

1st. That the judge who tried the cause erred in excluding evidence offered by plaintiff in error.

2d. That he erred in admitting testimony objected to by plaintiff in error.

3d. That he erred in his charge.

4th. That the judgment should have been for plaintiff in error.

The assignment of errors in plaintiff's brief is different from that in the transcript of the record.

Although it is submitted that the last is the one to be considered and that it is defective in being too indefinite, yet the questions raised and argued in the brief will be taken up as and in the order therein presented.

POINTS.

First. Plaintiff's brief assigns as error:

> "1. The defendant in error, failed to show that the plaintiff in error, was guilty of any negligence in keeping deer in its park," etc., and "defendant in error, was guilty of contributory negligence." (Page 2.)
>
> In the argument it seems to be assumed that these questions are before this court and properly to be considered and disposed of here.

This is a mistake. No such question can, by any possibility, be properly considered here. The case is here on a *bill of exceptions*. There is no *case* before the court.

This error is presented, if at all, in the assignment of errors in the record under the general claim, *that the judgment should have been for plaintiff in error and not for defendant.* (Record, page 13.)

This is too general properly to be considered as an assignment of error. It points to no error of law but merely claims, in general terms, that the judgment was wrong.

It may be safely assumed that a large majority of the parties against whom judgments are rendered upon trial, think them to be wrong.

Upon a bill of exceptions the court will only consider questions of law, which are clearly and specially set forth in the assignment of errors.

The judgment was according to the verdict and it is difficult to see how it could have been otherwise than what it is.

Whether the evidence, "failed to show negligence," or did show, "contributory negligence," are questions which it would seem that no court could pass upon without having the evidence before it. The evidence upon those subjects was varied and voluminous, but it is *not here*. That evidence raised *questions of fact* upon *those subjects*, which were duly presented to, and passed upon by, the jury. Neither the evidence nor the charge of the judge, on that branch of the case, are in the bill of exceptions, and the finding of the jury was conclusive and will not be looked into here.

This, it is submitted, disposes of this point, which seems to have been the main reliance of plaintiff in error. But it is proper to state, further, that in no event is it necessary for defendant in error to dispute the general rule as to liabilities for injuries done by animals, as stated in plaintiff's brief.

But when he comes to say, as he does on page 5, that: "It follows, therefore, that if the deer was a domesticated animal there was no cause of action made out because there *was no evidence* that it had ever before committed any injury, or exhibited any disposition to commit an injury," etc., he travels, not only outside the record, but is very wide of the truth. It was proved that this buck had in fact injured many of the witnesses who gave testimony on the trial. This assertion is not made as having any real bearing on this case, but merely to show the utter recklessness of the assertions on the other side and the impossibility of any such questions being properly discussed before or passed upon by this court. The case is here upon questions of law and not of fact.

The counsel for plaintiff in error is undoubtedly correct in saying that such an action "is founded upon negligence, actual or presumed."

In the case of an injury by a domestic animal, some evidence of viciousness and of notice or knowledge are generally required.

Where the injury is by a wild animal, clearly the presumption is that it was dangerous, and no notice or knowledge is required to be shown. The burden of showing it was not dangerous is, no doubt, upon the owner.

But an action may be maintained for an injury done by a domestic animal, without proof or notice of actual vice, if the jury find the injury to have resulted from the negligence of defendant — as when a horse was turned loose in a street and injured a child.

Dickson v. McCoy, 39 N. Y., 400.

It the whole evidence was here it would be seen that it clearly established the viciousness of this buck, and the knowledge and negligence of plaintiff in error and the absence of any contributory negligence in defend-

ant in error. As before said, however, these were questions of fact for the jury and they were duly passed upon by the jury under proper instructions.

SECOND. Evidence was received which was objected to by plaintiff in error. (Fols. 25, 26, 28.) This was the evidence of two witnesses as to the nature and characteristics of the buck deer.

The evidence was clearly admissible and competent. The court might very well have taken judicial knowledge or cognizance of the fact that the deer is, *feræ naturæ*, a wild and dangerous animal, particularly the buck deer in the fall of the year. Any testimony upon that subject was probably unnecessary, but it was competent and proper, and could not injure the plaintiff in error.

The witnesses had knowledge on the subject, were fully cross-examined, and the weight to be given to their testimony was properly a question for, and was fairly left to, the jury.

It is well settled that a person harboring or owning and keeping an animal *feræ naturæ*, is responsible for any injury it may do to another, without notice of its vicious character, other than that to be presumed from the nature of the beast.

Van Leuven v. Lyke, 1 Comstock N. Y., 516, and cases cited: "But as to animals *feræ naturæ*, such as lions, tigers and the like, the person who keeps them is liable for any damage they may do without notice, on the ground that by nature such animals are fierce and dangerous."

9. Bacon's Abridgement, Trespass, 1506, says: "If an action be brought for an injury done by a beast belonging to defendant, which is by nature fierce or dangerous, it is not necessary to allege that the defendant

knew the beast had before hurt some person, because the owner must at his peril keep a beast of this kind confined."

In Burton v. Newkirk (20 John., 75), the deer was judicially presumed to belong to the class of animals *feræ naturæ*. True this was on a question of property in the animal, but clearly the fact that an animal is *feræ naturæ* throws the burden of proof upon the person having or owning it to show that it was not fierce or dangerous. The presumption is that a wild animal which does an injury is dangerous. But if evidence was required upon this subject, it was because it was a question of science, natural history, and that given was entirely competent.

THIRD. The exception to the charge is frivolous. It is only to a clause of a sentence on the subject of damages. The charge upon the subject must be taken together. (Magniac v. Thompson, 7 Peters, 348, 390.) So taken, it was favorable to the plaintiff in error, and was clearly intended to, and, in fact, did lay down a sound rule, and cautioned the jury very carefully against any excess. (Fol. 31.)

The expression objected to is: "When you make up your mind as to the amount really sustained, you are not to be nice in the award of compensation, it should be liberal." It is claimed that the casual words, "it should be liberal," in effect, instructed the jury that they might give exemplary or punitive damages, and that such damages were not recoverable. Such an inference is unwarrantable, and does violence to common sense and the ordinary interpretation of language. The charge clearly limited the damages to be given by the jury to "the amount really sustained." It is difficult to see any legal objection to this language.

The jury certainly should not have been instructed *to be nice* or *illiberal* in their award of compensation.

Nice is defined to be, precise, fastidious, delicate, weak, minutely exact, etc.

Liberal is defined to be, generous, catholic, candid, not selfish, narrow or contracted.

Surely there can be no substantial objection to such a casual remark upon the subject of damages when the general rule laid down is sound. Especially where the judge had been so careful, as in this case, to warn the jury of the tendency of parties to exaggeration in such cases, and had called upon them to *guard themselves against* such exaggeration, and when he clearly tells them to give as damages "the amount really sustained."

Besides the exception is of no avail for the judge was not requested to alter his charge or charge otherwise.

"Courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

Locke v. U. S., 2 Cliff, 574, 580.
Castle v. Bullard, 23 How., 189.
Carver v. Jackson, 4 Peters, 80, 81.

In Smith v. McNamara (4 Lansing S. C. N. Y., 174), the court says: "Had he requested the court to charge that the deed under which he claimed contained this provision, *and to correct the error*, undoubtedly the request would have been granted. As he failed to do this, he has not brought himself within the rule applicable to exceptions in such cases," and in White v. McLean (57 N. Y., 672), "It was one of those unguarded expressions where the attention of the court should have been called specially to the phraseology used, by a special exception," etc.

If open to criticism of any kind, the expression was

in no sense a legal error. It laid down no improper or illegal rule of damages.

In Cleghorn v. N. Y. C. and H. R. R. R. (56 N. Y., 44), cited on the other side, the court held that the judge had substantially instructed the jury that they might award exemplary damages when it was not a case for such damages. That case has no bearing upon the one at bar, and so with all the other cases cited.

They grant a new trial where the court below clearly erred in instructing the jury that the case was a proper one for exemplary or punitive damages.

There is no case cited or to be found where a new trial has been granted upon a mere verbal criticism, when the charge stated a correct general rule of damages. To do so, in this case, would seem to be a denial of substantial justice.

But this question of damages was a matter to be presented, and it was presented and considered, on the motion for a new trial; and such matter, or the refusal of a new trial, cannot properly be assigned for error.

Schuchard v. Allen, 1 Wall., 371.
Freehorn v. Smith, 2 Wall., 160.
City v. Babcock, 3 Wall., 240.
Labor v. Cooper, 7 Wall., 571.

And again, the bill of exceptions does not purport to give the testimony on the subject of damages, and how is this court to say what that evidence may have been, or what rule was proper under the evidence? All such questions were up on the motion for a new trial and they were disposed of by the trial judge upon a case containing *all the evidence* and all the exceptions. His disposition of that motion was in view of all the facts, circumstances and evidence, and is not to be reviewed here upon a mere bill of exceptions containing but the merest trifle of the evidence and not purporting to give *all the evidence* upon the questions raised.

FOURTH. Although in the record it is claimed that the court erred in *excluding* evidence offered by plaintiff in error, none was either offered or excluded, and no such point is made upon the argument.

LASTLY. This case has evidently been brought here for *time*. A long time has been obtained and it is suggested that it is a proper case for affirmance, with ten per cent interest.

GEO. W. MILLER,
Of Counsel for Defendant in Error.